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Opinion of Counsel on Treasury Statement; Statement of Principles on Practice in Income Tax Field

American Institute of Accountants. Counsel

National Conference of Lawyers & CPAs

American Institute of Accountants

INCORPORATED UNDER THE LAWS OF THE DISTRICT OF COLUMBIA

THE NATIONAL ORGANIZATION OF CERTIFIED PUBLIC ACCOUNTANTS

270 MADISON AVENUE, NEW YORK 16, N. Y.

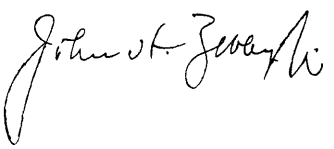
March 9, 1956

To Members of the
American Institute of Accountants

Gentlemen:

We are sending for your information a preprint of an editorial to appear in the April JOURNAL, a legal opinion of Institute's counsel, and a reprint of the "Statement of Principles Relating to Practice in the Field of Federal Income Taxation"—all of which relate to the Treasury Department statement of January 30th, which was mailed to you February 6th.

Yours truly,



JOHN H. ZEBLEY, JR.
President

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Editorial to Appear in April 1956 Issue of The Journal of Accountancy

LAST month we published a statement released by the Secretary of the Treasury January 30, 1956, interpreting parts of Treasury Department Circular No. 230 relating to practice before the Treasury Department by enrolled attorneys and agents.*

THE JOURNAL was going to press, and there was no time to prepare comment for publication in that issue. But the Treasury statement is highly significant to every tax practitioner, and should not be overlooked.

Meanwhile, counsel for the American Institute of Accountants has prepared an opinion on the legal effect of the statement, which immediately follows this editorial. This opinion deserves careful study.

The Treasury Department statement must be appraised in the light of recent events which led up to its issuance.

For many years certified public accountants have represented their clients fully before the Treasury Department to the apparent satisfaction of all concerned.

Recently it has been contended that some phases of practice before the Department constituted the "practice of law"; that the state courts had power to regulate the practice of law; and that state courts, therefore, could properly prevent nonlawyers from doing things, in representing taxpayers before the Treasury Department, which the courts held to be within the exclusive domain of lawyers.

The Treasury Department statement of January 30th seems clearly to confirm the long-established practice of enrolled agents before the Department and to make it clear that regulation of practice before the Department is within the exclusive province of the Secretary. But the Department warns both enrolled agents and attorneys that if the two groups do not respect the appropriate fields of each, as a matter of professional responsibility, the Department may find it necessary to define the appropriate scope of activity of members of each profession in Treasury practice, as it unquestionably has the power to do.

The Treasury Department refers to the "Statement of Principles Relating to Practice in the Field of Federal Income Taxation," approved by the governing bodies of the American Bar Association and the American Institute of Accountants in 1951, in connection with its references

* See JofA, Mar.56, p.6.

to professional responsibility. The "Statement of Principles" thereby acquires additional prestige, and for this reason we are reprinting it here.

We are gratified to report these developments. They should provide a basis for ending the unfortunate controversies about tax practice to which we have had to devote so much space in these pages in recent years. With the new assurance that certified public accountants may continue their customary practice before the Treasury Department without fear of harassment, other problems with which the legal and accounting professions are mutually concerned should yield to friendly negotiations.

"Ground rules" more specific in some respects than the "Statement of Principles" may be needed as a guide to both lawyers and accountants in observing the Treasury's admonition not to undertake work outside the field of their professional competence. Surely the American Bar Association and the American Institute of Accountants will prefer to establish such standards for themselves by voluntary cooperative effort. It is clear that the Treasury Department prefers to leave the task to them if they will do it.

Relations between lawyers and certified public accountants in actual practice have normally been friendly and cooperative. Members of both professions will welcome the opportunity now presented for resumption of the same relationship between their professional organizations.

Opinion of Counsel on Treasury Statement

February 23, 1956

American Institute of Accountants
270 Madison Avenue
New York 16, N. Y.

Dear Sirs:

You have asked our opinion as to the permissible scope of practice before the Treasury Department by enrolled agents under Treasury Department Circular 230 and the official Interpretation of Section 10.2 thereof promulgated by the Secretary of the Treasury January 30, 1956.

The Secretary of the Treasury has been given the power by Congress to regulate fully practice before the Department.

The Secretary of the Treasury has been expressly authorized by Congress to prescribe rules and regulations governing the recognition of "agents, attorneys, or other persons representing claimants before his Department . . ." 5 U.S.C., §261. This statute constitutes a valid delegation of power by Congress to the head of an executive department. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U.S. 117 (1926).

To the extent that the Secretary prescribes regulations governing practice before his Department, such regulations pre-empt the field. Under the Supremacy Clause of the Constitution, they supersede any state law which might have been applicable to the activities governed by the regulations if the regulations had not been issued. United States Constitution, Article VI; *Auerbacher* v. *Wood,* 139 N.J. Eq. 599, 53 A. 2d 800 (Ch. 1947), aff'd, 142 N.J. Eq. 484, 59 A. 2d 863 (Ct. Err. & App. 1948). *DePass* v. *B. Harris Wool Co.,* 346 Mo. 1038, 144 S.W. 2d 146 (1940).

Varying interpretations of Treasury Circular 230 had raised some question as to whether the Secretary had fully exercised the power to regulate the scope of practice before the Department.

The Secretary of the Treasury has issued regulations governing practice before the Department and these are set forth in Treasury Department Circular No. 230. 31 C.F.R., Subtitle A, Part 10. The scope of the practice thus regulated is dealt with in Section 10.2 of these regulations, particularly in subsections 10.2(b) and 10.2(f).

Subsections 10.2(b) and 10.2(f) read as follows:

> 10.2(b): Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests. Unless otherwise stated the term "Treasury Department" as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office, or unit.
>
> 10.2(f): *Rights and duties of agents.* An agent enrolled before the Treasury Department shall have the same rights, powers, and privileges

and be subject to the same duties as an enrolled attorney: *Provided,* That an enrolled agent shall not have the privilege of drafting or preparing any written instrument by which title to real or personal property may be conveyed or transferred for the purpose of affecting Federal taxes, nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the Federal taxes of such client: *And provided further,* That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.

While the second proviso of subsection 10.2(f) has long been part of the regulations, it received virtually no attention or comment until relatively recently, although one court during this early period did uphold the right of accountants to practice fully before the Treasury Department. *Richter* v. *Moon,* (Pa. Ct. of Cm. P. 1939), JofA, Nov.42, p.470. In this earlier period, at least one Bar Association spokesman interpreted this proviso as having the effect only of prohibiting enrolled agents who were not members of the bar from holding themselves out as attorneys by virtue of their authorization to practice before the Department. He stated that the proviso did not limit in any way the scope of practice permitted to enrolled agents by the regulation. Julius Henry Cohen, 9 ICC, Practitioners' Journal 874.

More recently, Section 10.2(f) and, in particular, the second proviso of that section has been considered and interpreted for the first time by a state court. In *Agran* v. *Shapiro,* 127 Cal. App. 2d 807, 273 P. 2d 619 (1954), the Superior Court of California held that this second proviso constituted a "disavowal" by the Secretary of the Treasury of any intention to authorize enrolled agents to engage in activities which might constitute the unauthorized practice of law in the particular state in which they took place. In effect, the Court held that the scope of practice authorized by the regulations was, by the terms of the regulations themselves, limited by the state law of unauthorized practice of law of the various states in which representation of clients before the Treasury Department was carried on by enrolled agents.

On the other hand, more recently the Supreme Court of Georgia upheld the claim of an enrolled agent for a fee for services consisting of the representation of his client before the Treasury Department on the ground that under the regulations of the Department he was authorized to practice there. *Irwin* v. *Young,* 90 S.E. 2d 22 (1955).

The Treasury Department's Interpretation of Circular 230 published January 30, 1956, makes it clear that in Circular 230 the Secretary

intended to and did exercise fully his power to regulate the scope of practice before the Department.

The Secretary of the Treasury has now issued an Interpretation of the rules and regulations relating to practice set forth in Circular 230 which is directed specifically to Section 10.2 of the Circular.

The Interpretation calls attention to the provisions of Section 10.2(b) which state that the scope of practice (of agents, as well as attorneys) before the Department comprehends "all matters connected with the presentation of a client's interest to the Treasury Department." The Interpretation goes on to note that enrollees "whether agents or attorneys" had been "satisfactorily fully representing clients before the Department for many years." The Interpretation states that the Department believes this to have been beneficial to taxpayers and to the Government and that "there presently appears no reason why the present scope and type of practice should not continue as it has in the past."

The Interpretation then goes on to state that the attention of the Department has been called to "the decisions of certain State courts and to statements which suggest varying interpretations of §10.2(f) of the Circular."

The Interpretation summarizes the provisions of Section 10.2(f), including the second proviso of that section. It then goes on to state as follows:

> The uniform interpretation and administration of this and other sections of Circular 230 by the Department are essential to the proper discharge of the above responsibility imposed on it by the Congress.
>
> It is not the intention of the Department that this second proviso should be interpreted as an election by the Department not to exercise fully its responsibility to determine the proper scope of practice by enrolled agents and attorneys before the Department.

This statement constitutes the clearest possible statement of the intention of the Secretary of the Treasury to pre-empt control over the determination of the scope of practice before the Department by enrolled agents—and by enrolled attorneys as well. Since the Secretary is the officer to whom Congress has delegated the power to regulate practice before the Department, his official statement as to the meaning of the regulations he has published is conclusive.

It follows that the Secretary, by the regulations governing practice contained in Circular 230, has pre-empted wholly the matter of determining the proper scope of practice before the Treasury Department by

enrolled persons. This being so, it follows as a matter of constitutional law that no state has the power through its courts, or otherwise, to modify, limit or otherwise determine the proper scope of practice before the Treasury Department whether by enrolled agents or enrolled attorneys. Cf. *Selling* v. *Radford,* 243 U.S. 46 (1917), and authorities cited *supra.*

This does not mean that there are no limitations whatever upon the scope of practice by enrolled agents or by enrolled attorneys before the Treasury Department. It simply means that the scope of such practice is not subject to limitations imposed by state courts applying state unauthorized practice of law statutes or principles or for that matter, state statutes prohibiting the practice of accounting by unlicensed persons.

The Interpretation makes it clear that the Department contemplates that in certain situations enrolled agents and enrolled attorneys should obtain the assistance of a member of the other profession. At the present time the Department has not attempted to determine or define these situations. Instead, it has, as the Interpretation notes, "properly placed" the responsibility for making this determination in any specific situation "on its enrolled agents and enrolled attorneys."

In this connection the Interpretation draws attention to the provisions of Section 10.2(z) which require enrolled attorneys to "observe the canons of ethics of the American Bar Association and enrolled agents must observe the ethical standards of the accounting profession." Also, in this connection, the Department in the Interpretation notes with gratification the extent to which the two professions over the years have made progress toward "mutual understanding of the proper sphere of each, as exemplified in the Joint Statement of Principles Relating to Practice in the Field of Federal Taxation."

The Interpretation closes on a somewhat admonitory note. The Department states that the question of Treasury practice will be kept under surveillance. If it is found at any time that the professional responsibilities of enrolled agents or enrolled attorneys are not being properly carried out or that enrolled agents and enrolled attorneys are not "respecting the appropriate fields of each" in accordance with the Statement of Principles then, the Interpretation states, the matter can be reviewed to determine whether it is necessary to amend the provisions of the Circular or "take other appropriate action."

The Interpretation makes it clear that Circular 230 is not intended to affect practice by accountants or lawyers in any part of the tax field other than Treasury practice.

The Interpretation makes it clear that the Department does not regard itself as having either the responsibility or the authority to regulate the professional activities of lawyers and accountants "beyond the scope of their practice before the Department as defined in Section 10.2(b)."

In short, Circular 230 and the recently published Interpretation of the Circular deal only with practice before the Treasury Department and not with any other aspect of Federal tax practice.

Yours very truly,

CAHILL, GORDON, REINDEL, & OHL,

By *Matthias F. Correa*

Statement of Principles Relating to Practice in the Field of Federal Income Taxation

Promulgated by the National Conference of Lawyers and Certified Public Accountants

Preamble. In our present complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Each of these groups is well qualified to serve the public in its respective field. The primary function of the lawyer is to advise the public with respect to the legal implications involved in such problems, whereas the certified public accountant has to do with the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have some-

times been inextricably intermingled. As a result, there has been some doubt as to where the functions of one profession end and those of the other begin.

For the guidance of members of each profession the National Conference of Lawyers and Certified Public Accountants recommends the following statement of principles relating to practice in the field of federal income taxation:

1. Collaboration of Lawyers and Certified Public Accountants Desirable. It is in the best public interest that services and assistance in federal income tax matters be rendered by lawyers and certified public accountants, who are trained in their fields by education and experience, and for whose admission to professional standing there are requirements as to education, citizenship, and high moral character. They are required to pass written examinations and are subject to rules of professional ethics, such as those of the American Bar Association and American Institute of Accountants, which set a high standard of professional practice and conduct, including prohibition of advertising and solicitation. Many problems connected with business require the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented.

2. Preparation of Federal Income Tax Returns. It is a proper function of a lawyer or a certified public accountant to prepare federal income tax returns.

When a lawyer prepares a return in which questions of accounting arise, he should advise the taxpayer to enlist the assistance of a certified public accountant.

When a certified public accountant prepares a return in which questions of law arise, he should advise the taxpayer to enlist the assistance of a lawyer.

3. Ascertainment of Probable Tax Effects of Transactions. In the course of the practice of law and in the course of the practice of accounting, lawyers and certified public accountants are often asked about the probable tax effects of transactions.

The ascertainment of probable tax effects of transactions frequently

is within the function of either a certified public accountant or a lawyer. However, in many instances, problems arise which require the attention of a member of one or the other profession, or members of both. When such ascertainment raises uncertainties as to the interpretation of law (both tax law and general law), or uncertainties as to the application of law to the transaction involved, the certified public accountant should advise the taxpayer to enlist the services of a lawyer. When such ascertainment involves difficult questions of classifying and summarizing the transaction in a significant manner and in terms of money, or interpreting the financial results thereof, the lawyer should advise the taxpayer to enlist the services of a certified public accountant.

In many cases, therefore, the public will be best served by utilizing the joint skills of both professions.

4. Preparation of Legal and Accounting Documents. Only a lawyer may prepare legal documents such as agreements, conveyances, trust instruments, wills, or corporate minutes, or give advice as to the legal sufficiency or effect thereof, or take the necessary steps to create, amend, or dissolve a partnership, corporation, trust, or other legal entity.

Only an accountant may properly advise as to the preparation of financial statements included in reports or submitted with tax returns, or as to accounting methods and procedures.

5. Prohibited Self-Designations. An accountant should not describe himself as a "tax consultant" or "tax expert" or use any similar phrase. Lawyers, similarly, are prohibited by the canons of ethics of the American Bar Association, and the opinions relating thereto, from advertising a special branch of law practice.

6. Representation of Taxpayers Before Treasury Department. Under Treasury Department regulations lawyers and certified public accountants are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if, in the course of such proceedings accounting questions arise, a certified public accountant should be retained.

7. Practice Before the Tax Court of the United States. Under the Tax Court rules nonlawyers may be admitted to practice.

However, since upon issuance of a formal notice of deficiency by the Commissioner of Internal Revenue a choice of legal remedies is afforded the taxpayer under existing law (either before the Tax Court of the United States, a United States District Court, or the Court of Claims), it is in the best interests of the taxpayer that the advice of a lawyer be sought if further proceedings are contemplated. It is not intended hereby to foreclose the right of nonlawyers to practice before the Tax Court of the United States pursuant to its rules.

Here also, as in proceedings before the Treasury Department, the taxpayer, in many cases, is best served by the combined skills of both lawyers and certified public accountants, and the taxpayers, in such cases, should be advised accordingly.

8. Claims for Refund. Claims for refund may be prepared by lawyers or certified public accountants, provided, however, that where a controversial legal issue is involved or where the claim is to be made the basis of litigation, the services of a lawyer should be obtained.

9. Criminal Tax Investigations. When a certified public accountant learns that his client is being specially investigated for possible criminal violation of the Income Tax Law, he should advise his client to seek the advice of a lawyer as to his legal and constitutional rights.

Conclusion. This statement of principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public. It is recommended that joint committees representing the local societies of both professions be established. Such committees might well take permanent form as local conferences of lawyers and certified public accountants patterned after this conference, or could take the form of special committees to handle a specific situation.